Supreme Court, U.S.
FILED
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No. 06-781

IN THE

# United States Supreme Court

SARAH HENDRIX,

*Petitioner.*

*v.*

HENRY PAULSON, SECRETARY OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES OF AMERICA, RICHARD BYRD, MICHAEL MCBRIDE, JOHN BUTKOVICH, WANDA EDMONDSON, TY AYRES and WILLIAM ZACHERY,

*Respondents.*

Appendix
Volume 1 of 2

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the 11th Circuit*

## PETITION FOR WRIT OF CERTIORARI

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July 12, 2006
Revised September 17, 2006
Revised November 22, 2006

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# APPENDIX A – F

# A

A-1 [DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
February 8, 2006
THOMAS K. KAHN
CLERK

No. 05-11583
Non-Argument Calendar

D. C. Docket No. 97-03579-CV-RWS-1

SARAH E. HENDRIX,

Plaintiff-Appellant,

versus

JOHN SNOW, Secretary of the
Department of the Treasury of
the United States of America,
UNITED STATES OF AMERICA,
WANDA EDMUNDSON,
MICHAEL MCBRIDE,
JOHN BUTKOVICH, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

**(February 8, 2006)**

Before TJOFLAT, WILSON and FAY, Circuit Judges.

**PER CURIAM:**

Sarah E. Hendrix appeals pro se[1] the district court's order granting summary judgment to her former employer, John W. Snow, the Secretary of the Department of the Treasury ("Secretary"), and six current or former employees of the Department of the Treasury, including Wanda Edmundson, Michael McBride, John Butkovich, William Zachery, Ty Ayres, and Richard Byrd ("individual defendants"), on her claims of employment discrimination based on race and sex, under 42 U.S.C. § 2000e-2(a) ("Title VII"); and retaliation, under 42 U.S.C. § 2000e-3; violations of the Whistleblower Protection Act ("WPA"), under 5 U.S.C. § 1221; conspiracy to interfere with official duties, under 42 U.S.C. § 1985(1);[2] and state-law claims of intentional infliction of emotional distress. For the reasons set forth more fully below, we affirm.

In November 1997, Hendrix, a white female who was employed by the Internal Revenue Service ("IRS") as a Revenue Officer, filed a counseled civil complaint, naming the Secretary as the sole defendant. Hendrix alleged in her complaint that, soon after she was transferred from the Manhattan District to the Georgia District in 1994, and continuing until her termination from this employment in January 1998, her employer harassed and discriminated against her because of her race and sex. Hendrix also contended that she was retaliated against for making complaints and was wrongfully suspended in July 1996.

In June and July 1998, Hendrix filed (1) an unopposed motion to amend her complaint, and (2) her First Amended

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1 Although Hendrix proceeded with various counsel in the district court, she terminated her last counsel's services prior to filing this appeal.

2 Section 1985(1) specifically proscribes conspiracies that interfere with the performance of official duties by federal officers. See Kush v. Rutledge, 460 U.S. 719, 724, 103 S.Ct. 1483, 1486-87, 75 L.Ed.2d 413 (1983).

Complaint. Her First Amended Complaint included two additional Title VII claims, alleging that the Secretary (1) subjected her to employment discrimination on the basis of race and sex, and (2) terminated her employment in December 1997, in retaliation against her complaining about her employer's discriminatory acts, filing administrative complaints, and contacting members of Congress and the media ("Counts One and Two"). In August 2001, after receiving leave to file another amended complaint, Hendrix filed her Second Amended Complaint, adding as defendants in their individual capacities six employees of the Treasury Department, and adding a claim for violations of the WPA, because the defendants took "personnel actions" and terminated her employment because of protected disclosures that she had made ("Count Three"); a claim of conspiracy under § 1985(1) ("Count Four"); and claims of intentional infliction of emotional distress ("Count Five"). Finally, in August 2004, the court granted Hendrix leave to file a "Third Amendment to Complaint," whereby she amended Count Five to allege as follows:

> Plaintiff has complied with the Federal Tort Claims Act, 28 U.S.C. § 2675(a), by filing all appropriate administrative claims regarding the offending activities of the Defendants. Plaintiff has exhausted those administrative remedies available to her.

The United States Attorney for the Northern District of Georgia ("U.S. Attorney") subsequently issued a certification that each of the defendants sued in their individual capacities was acting within the scope of his or her employment with the Department of the Treasury, the Treasury Inspector General for Tax Administration ("TIGTA"), or the IRS, at the time he or she allegedly committed the acts or omissions alleged in Hendrix's Third Amended Complaint. The U.S. Attorney also filed with this certification notice of the

substitution of the government for the individual defendants as to all tort claims, pursuant to 28 U.S.C. § 2679.

All of the defendants then moved for either dismissal or summary judgment. The government first argued that Hendrix's tort claims should be dismissed because, after the substitution of the government for the individual defendants, the Federal Tort Claim Act ("FTCA"), 18 U.S.C. § 2671, et seq., expressly barred tort claims against the Secretary in his official capacity. The government also contended that, although the FTCA provides for a limited waiver of sovereign immunity against the government, this waiver was not applicable because Hendrix had failed to exhaust her administrative remedies under 28 U.S.C. § 2675, by not filing an administrative FTCA claim relating to acts or omissions attributable to TIGTA or IRS employees.

The Secretary similarly argued that he was due summary judgment on Hendrix's tort claims because the FTCA expressly bars tort claims against him in his official capacity. The Secretary contended that summary judgment was warranted on Hendrix's § 1985(1) claims because Hendrix could not show that the government had waived its sovereign immunity. The Secretary argued that Hendrix had failed to exhaust her administrative remedies for her WPA claims, as contained in the CSRA, because, once she elected to pursue her WPA claims before the Office of Special Counsel ("OSC"), and the OSC denied her claims, she was required to, but did not, seek review of this denial by the Merit System Protection Board ("MSPB"). The Secretary further contended that Hendrix's Title VII claims, other than her claims relating to her suspension, were barred by her failure to timely exhaust her administrative remedies. Additionally, the Secretary asserted that summary judgment was warranted as to Hendrix's Title VII claims relating to her suspension because (1) Hendrix had failed to identify another employee

outside of her protected class who had been disciplined differently for engaging in the same conduct;[3] and (2) her suspension was proposed before she engaged in any protected activities.

Similarly, the individual defendants moved for summary judgment, arguing that Hendrix's WPA claims were due to be dismissed because, among other things, Hendrix had failed to exhaust her administrative remedies by appealing her claims to the MSPB.[4] The individual defendants contended that summary judgment was warranted on Hendrix's § 1985(1) claims because, as statutory claims against federal employees that arose out of Hendrix's federal employment, they were preempted by the CSRA. Alternatively, the individual defendants argued that the § 1985(1) claims were time barred because Hendrix did not seek to add them until January 2001, more than two years after her termination in January 1998—the most recent act Hendrix attributed to the defendants.

In support of the defendants' arguments that Hendrix failed to exhaust her administrative remedies relating to her claims under Title VII and the WPA, they submitted the following evidence. In a formal complaint, which Hendrix filed with the IRS's Equal Employment Office ("EEO") on August 5, 1996, she identified 18 issues, which the

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3 This conduct included Hendrix's (1) twice taking home case files home in violation of a directive to keep them in the office; (2) refusing to turn over her case files after management went to her residence to retrieve them; and (3) stating in front of a co-worker that "either I'm going to kill her or she's going to kill me."

4 Congress created the MSPB in 1978 as part of the Civil Service Reform Act ("CSRA"). See 5 U.S.C. § 1201 et seq.. The CSRA provides for review of most personnel actions taken by a federal agency against an "employee," see 5 U.S.C. § 7551 (defining employee), and affords employees aggrieved by an adverse employment action a right to seek judicial review of decisions of the MSPB, see 5 U.S.C. § 7703(a)(1). "MSPB review of adverse employment actions was designed to protect federal employees from widespread politically motivated terminations whenever the party in power changed hands." See Chappell v. Chao, 388 F.3d 1373, 1375 n.1 (11th Cir. 2004).

EEO grouped into 6 claims: (1) in January 1994, when she transferred to the Georgia District, she did not receive a promised position as an International Examiner ("IE"); (2) in April 1994, she was not advised that she could have been subject to criminal prosecution for providing false information regarding financial obligations; (3) in April 1995, she was denied selection for an IE position; (4) from September 1995 until April 1996, she was subject to various instances of harassment; (5) on January 30, 1996, she was given a poor annual evaluation; and (6) in July 1996, she was wrongfully suspended ("EEO-1").

On January 15, 1997, the EEO issued a final agency decision, notifying Hendrix that it was dismissing her first five claims as untimely because she had failed to seek counseling within 45 days of the alleged acts. As part of this notice, the EEO also informed Hendrix that (1) the decision constituted the final decision by the Department of the Treasury on the dismissed portions of the complaint, (2) Hendrix either could file a civil action in the district court within 30 days or file an appeal with the MSPB, and (3) Hendrix could not appeal to the Equal Employment Opportunity Commission ("EEOC"). Nevertheless, Hendrix filed an appeal of this final agency decision with the EEOC, which the EEOC dismissed on October 30, 1997, for improper venue.

On August 14, 1997, while Hendrix's appeal from EEO-1 was pending, she filed a complaint with the Office of the Special Counsel ("OSC"), alleging that the defendants had violated the WPA by issuing her a 60-day opportunity letter—informing her that she had to improve her performance within 60 days to avoid the termination of her employment—in retaliation against disclosures she had made in a letter to "Mr. Cowan" on May 6, 1997. Hendrix also subsequently alleged that the defendants violated the WPA by placing her on paid leave, effective October 9,

1997, during the time period she had for responding to a notice of her proposed termination. On November 17, 1997, the OSC issued a decision, whereby it (1) declined review of Hendrix's Title VII claims because Hendrix already had filed an EEO complaint, and (2) determined that Hendrix had failed to state a WPA violation.

On July 24, 1997, Hendrix filed a second EEO complaint ("EEO-2"), which the EEO dismissed on August 27, 1997, based on its determination that the claims she was attempting to raise already had been raised in another proceeding. Furthermore, on March 4, 1998, Hendrix filed a third EEO complaint ("EEO-3") with the IRS Office, alleging that the termination of her employment in January 1998, was wrongful. As discussed above, Hendrix filed an amended civil complaint in the district court, adding this wrongful discharge claim, on June 25, 1998, less than 120 days after filing her EEO-3 complaint.

The Clerk of the Court then issued notices to Hendrix, advising her to respond to these summary judgment motions. Hendrix opposed these motions, arguing that summary judgment should not be granted for her claims against the government because (1) the government should not be substituted for the individual defendants, who remained liable in their individual capacities under the FTCA; and (2) she had exhausted her administrative remedies by filing three EEO complaints. Hendrix also contended that summary judgment was not warranted for her claims against the Secretary and the individual defendants because (1) the government should not be substituted for the Secretary and the individual defendants; (2) she had a remedy against the Secretary and the individual defendants in their individual capacities under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct.

1999, 29 L.Ed.2d 619 (1971);[5] (3) she had a private right of action, created by a 1998 amendment to 26 U.S.C. § 7804, through which she could raise a § 1985(1) claim; (4) she exhausted her administrative remedies for her WPA claims by submitting "mixed case" EEO complaints; and (5) unidentified disputed issues of fact existed as to her Title VII claims against the Secretary.

After Hendrix also filed separate objections to the U.S. Attorney's scope-of employment certifications, the district court conducted an evidentiary hearing. The court subsequently granted the defendants' motions for dismissal and/or summary judgment as to all of Hendrix's claims. The court first determined that, because Hendrix had satisfied the exhaustion requirements for her Title VII claims relating only to her 15-day suspension, her remaining Title VII claims should be dismissed.[6] The court also determined that Hendrix's Title VII claims relating to her suspension should be dismissed based on her failure to establish a prima facie case because she (1) failed to identify a similarly situated employee outside of her protected class who engaged in similar misconduct, but who received more favorable treatment; (2) failed to cite to evidence showing that the suspension was discriminatory; and (3) conceded in her response to the defendants' statement of material facts that she "had not filed any EEO complaints at the time of the 15-day suspension."

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5 In Bivens, the Supreme Court held that plaintiffs may bring a cause of action for money damages against federal officers in their individual capacities based on a violation of a constitutional right. See Bivens, 403 U.S. at 395-97, 91 S.Ct. at 2004-05.

6 In concluding that Hendrix had failed to exhaust her administrative remedies as to the majority of her Title VII claims, the court explained that Hendrix (1) neither filed an action in the district court within 30 days, nor appealed to the MSPB, the EEO's decision that all of her claims in EEO-1, except those relating to her suspension, were untimely; and (2) filed her first amended complaint, adding her wrongful-termination claim, less than 120 days after raising this claim in EEO-3.

The court next granted the defendants summary judgment on Hendrix's WPA claims, concluding that Hendrix had failed to exhaust her administrative remedies for these claims because, although Hendrix's EEO complaints might be considered "mixed case[s,]" (1) Hendrix had failed to raise her WPA claims in any of her EEO complaints; (2) her claims in the instant case, nevertheless, would have been untimely; and (3) she failed to appeal to the MSPB the OSC's decision dismissing her WPA claims. The court also granted summary judgment on Hendrix's § 1985(1) conspiracy claim against the individual defendants, explaining that, because this claim arose out of the federal employment relationship, the CSRA was her exclusive remedy. Additionally, the court explained that, to the extent Hendrix was contending that she could maintain an action against the individual defendants, pursuant to Bivens, we had rejected this argument.

Finally, the court determined that summary judgment was warranted as to Hendrix's tort claims. The court explained that, because the individual defendants' alleged tortious acts involved acts and decisions they made relating to Hendrix's employment with the IRS, including employee discipline, participating in investigations of employee wrongdoing, and decision-making regarding training and promotions, Hendrix had failed to establish that these were committed outside the scope of the individual defendants' federal employment,

even if the acts were intentional or malicious.[7] The court, therefore, concluded that the U.S. Attorney's scope-of-employment certifications were proper, and it ordered the substitution of the government for the individual defendants as to Hendrix's tort claims. After the substitution of the government, the court also concluded these claims were preempted by the CSRA because they involved prohibited personnel actions as contemplated by 5 U.S.C. § 2302.

As a preliminary matter, because the defendants filed their motions as alternative motions to dismiss or for summary judgment, we must determine how to construe them. "Once the court considers matters outside the complaint, the Rule 12(b)(6) motion to dismiss converts into a motion for summary judgment." Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A., 104 F.3d 1256, 1266 n.11 (11th Cir. 1997). A district court, however, in converting a motion to dismiss into a motion for summary judgment, generally "must notify the parties and allow the parties ten days to submit relevant evidence and arguments in support or opposition to the merits." Id.

Here, before granting the defendants' motions for summary judgment, the clerk of the court issued three orders, notifying Hendrix that, after the 20-day period she had to respond had elapsed, the court intended to take the

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7 Clarifying that it was not discussing each of the alleged tortious acts that Hendrix had identified, the court explained that it had reviewed each of the acts individually and determined that Hendrix both had failed to identify a tortious act committed by each individual defendant and not shown that any of the individual defendants were acting outside the scope of their employment. The court also specifically explained that: (1) to the extent Hendrix was arguing that the acts involved conduct that could subject the defendants to discipline or termination by the IRS, she was merely disagreeing with decisions made; (2) Hendrix had failed to name as a defendant the person responsible for selecting the employee to file the IE position; and (3) even if her immediate supervisor's frequent reviews of her work and orders for her to leave files in the office were intended to induce Hendrix to quit her job, these were all job-related decisions.

defendants' motions for summary judgment under advisement and that Hendrix's response had to show a triable issue through affidavits or other materials. Regardless, even if this notification was not sufficient to convert the pleading into a summary judgment motion, Hendrix has not contended, and the record does not reflect, that, following this notice, Hendrix was unaware of the court's intent and, otherwise, would have presented additional materials. See Trustmark Ins. Co. v. ESLU, Inc., 299 F.3d 1265, 1268-69 (11th Cir. 2002) (concluding that plaintiff's response to the court's notice, as well as the plaintiff's attachments to its response to the dispositive motion and its failure to show that it otherwise would have proffered additional evidence, rendered the case sufficiently "unique," such that it constituted an exception to the Rule 56(c) notice requirement). Because the court in this case cited to the parties' pleadings, evidentiary submissions, and legal arguments, and because the record reflects that Hendrix had notice of the court's intent and her burden of response, the defendants' dispositive motions will be reviewed as motions for summary judgment.

A court's order granting summary judgment is reviewed de novo, "view[ing] all evidence and all factual inferences therefrom in the light most favorable to the non-moving party." Miller v. King, 384 F.3d 1248, 1258-59 (11th Cir. 2004). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. at 1259 (quotation omitted).

**Issue 1: Title VII claims**

Hendrix generally argues that the district court erroneously granted the defendants summary judgment on the merits of her Title VII claims when disputed issues of fact existed. Without directly challenging the district court's conclusions concerning her failure to timely exhaust her administrative remedies, Hendrix also argues for the first time on appeal that, pursuant to the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the court should have construed her claims as stating a claim of continuing hostile work environment, such that, if her claim relating to her temporary suspension was timely, all of her claims were timely. Additionally, Hendrix asserts that the court erred in dismissing her Title VII claims based on her suspension because she "was suspended for 15 days on a trumped up charge that she somehow threatened Appellee Edmundson's life."

To the extent the district court dismissed the majority of Hendrix's Title VII claims based on her failure to exhaust her administrative remedies, "[a] federal employee must pursue and exhaust her administrative remedies as a jurisdictional prerequisite to filing a Title VII action." See Crawford v. Babbitt, 186 F.3d 1322, 1326 (11th Cir. 1999) (citing Brown v. General Servs. Admin., 425 U.S. 820, 832- 33, 96 S.Ct. 1961, 1967-68, 48 L.Ed.2d 402 (1976)). A federal employee who alleges both discrimination in violation of Title VII and "adverse employment actions" affecting federal civil servants, that is, a "mixed case," may choose between filing a "mixed case complaint" with her agency's EEO office, or filing a "mixed case appeal" directly with the MSPB. 29 C.F.R. § 1614.302(b). She may not file under both, however. Id. The relevant agency EEO office and the MSPB can and must address both the discrimination claims and the appealable personnel actions. Id.

A federal employee who chooses to assert her "mixed case complaint" against the government through her agency's EEO office, as Hendrix did, must undergo a two-step process to exhaust her administrative remedies: (1) informal counseling with an EEO counselor within 45 days of the challenged employment act, and (2) the filing of a formal complaint with the agency or department within 15 days after the EEO counselor has issued a notice of final interview. 29 C.F.R. §§ 1614.105 and 1614.106. Moreover, in a "mixed case complaint," a federal employee may not file a civil suit in the district court until 120 days after she filed her formal complaint with the employing agency. 5 U.S.C. § 7702(e)(1)(A).

In the instant case, Hendrix initially contacted an EEO counselor on June 6, 1996, and she filed her first formal "mixed case" EEO complaint, that is, EEO-1, on August 5, 1996, raising 18 issues, which the IRS's EEO office grouped into six discrete claims. On January 15, 1997, the EEO properly issued a decision, notifying Hendrix that it was dismissing all of Hendrix's claims, other than her claims relating to her suspension on July 1996, because they occurred more than 45 days before she initiated her complaint and, thus, were untimely. Moreover, the EEO advised Hendrix that she either could file a civil action in the district court within 30 days or appeal the decision to the MSPB. Because Hendrix failed to take either of these measures and, instead, appealed to the EEOC, the district court did not err in concluding that she failed to exhaust her administrative remedies as to these claims. See 29 C.F.R. § 1614.302(b).

As discussed above, Hendrix also contacted an EEO counselor concerning her discharge on January 11, 1998, and filed a third formal EEO complaint, that is, EEO-3, on March 4, 1998. Because Hendrix's discharge occurred in January 1998, her filing of EEO-3 was timely. See 29 C.F.R.

§§ 1614.105 and 1614.106. However, by adding this claim in her amended complaint on June 25, 1998, less than 120 days after she filed EEO-3, she failed to first exhaust her administrative remedies. See 5 U.S.C. § 7702(e)(1)(A). Thus, the district court also did not err in concluding that summary judgment was warranted as to Hendrix's discharge claim.

Indeed, Hendrix is not challenging directly the district court's findings applying these rules of exhaustion. Instead, Hendrix is arguing for the first time on appeal that the court should have construed her claims as a claim of hostile work environment, such that all of her claims were timely. We, however, normally will not consider a legal issue or theory raised for the first time on appeal. See Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A., 377 F.3d 1164, 1168-69 (11th Cir. 2004). Moreover, although this general rule is not jurisdictional, and we may choose to hear newly-raised arguments under "special circumstances," Hendrix has not alleged that any of these circumstances are applicable to her case. See Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1332 (11th Cir. 2004) (listing the following five "special circumstances": (1) the issue involves a pure question of law, where the court's refusal to consider it would result in a miscarriage of justice; (2) the appellant had no opportunity to raise an objection in the district court; (3) interests of substantial justice are at stake; (4) the proper resolution of the issue is beyond any doubt; or (5) the issue presents significant questions of general impact or of great public concern). Hendrix also has not provided any basis for her failure to raise this issue in the district court, where she was represented by counsel.

Finally, to the extent Hendrix generally is arguing that the district court erred in granting summary judgment as to her claims of disparate treatment and retaliation relating to her suspension, Title VII prohibits employers from discriminating "against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). It also is unlawful under Title VII for an employer to retaliate against an employee "because [the employee] has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [of Title VII]." 42 U.S.C. § 2000e-3(a).

Where direct evidence of discrimination or retaliation is unavailable—as was the case here—a plaintiff may present circumstantial evidence of discrimination sufficient to create a jury question. Silvera v. Orange County School Bd., 244 F.3d 1253, 1258 (11th Cir. 2001) (Title VII disparate treatment); Sullivan v. National Railroad Passenger Corp., 170 F.3d 1056, 1059-60 (11th Cir. 1999) (Title VII retaliation). For claims based on circumstantial evidence, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Silvera, 244 F.3d at 1258. If the plaintiff is successful, the defendant must "articulate some legitimate, nondiscriminatory reason for the [adverse employment action]." Id. The plaintiff then may attempt to demonstrate that the proffered reason was, in fact, merely pretext for the defendant's acts. Id.[8] "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id.

"A plaintiff establishes a prima facie case of disparate treatment by showing that she was a qualified member of a protected class and was subjected to an adverse employment action in contrast with similarly situated employees outside

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8 The Supreme Court set out this three-part burden-shifting framework in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

the protected class." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004). To show that employees are similarly situated, the plaintiff must establish that the employees are "similarly situated in all relevant respects." Id. at 1091 (quotation omitted). Indeed, the comparator employee "must be nearly identical to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer." Id. (citing Silvera, 244 F.3d at 1259). Because Hendrix failed to identify in her amended complaint or her response to the Secretary's summary judgment motion a comparator employee, much less explain why the employee was similarly situated, the court did not err in concluding that she failed to establish a prima facie case of disparate treatment.

To the extent Hendrix also was attempting to establish a prima facie case of Title VII retaliation, a successful plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression. See Cooper v. Southern Co., 390 F.3d 695, 740 (11th Cir. 2004), cert. denied, 126 S.Ct. 478 (2005). As the district court discussed, Hendrix conceded, and the record reflects, that she had not filed any EEO complaints prior to her June 1996 suspension. Moreover, Hendrix has failed to identify any other statutorily protected expression. Thus, the district court also did not err in concluding that Hendrix failed to establish a prima facie case of Title VII retaliation. We, therefore, conclude that the district court properly granted the Secretary's motion for summary judgment on all of Hendrix's Title VII claims.

**Issue 2: Claims under the Whistleblower Protection Act**

Hendrix argues that the court erred in concluding that she did not exhaust her administrative remedies as to her WPA claims because she made a good-faith attempt to exhaust them by submitting a claim to the OSC. Hendrix also contends that, due to her previous filing of an EEO complaint, she reasonably believed that she could not seek review before the MSPB.

The WPA provides protection to federal employees against agency reprisal for whistleblowing activities, such as disclosing illegal conduct, gross mismanagement, gross waste of funds, or acts presenting substantial dangers to health and safety. See 5 U.S.C. § 2302(b)(8). To the extent Hendrix's brief can be construed as arguing that the district court erred in dismissing her WPA claims based on its determination that the CSRA provides the exclusive remedy for those claims, the district court, in fact, correctly explained that the WPA was an amendment to, and, thus, a part of the CSRA, and it considered her WPA claims under the procedural framework of the CSRA, see Broughton v. Courtney, 861 F.2d 639, 643 (11th Cir. 1988) (the CSRA provides the exclusive procedure for challenging federal personnel decisions). Indeed, although we have not previously directly addressed this issue, the D.C. Circuit has concluded that, "[u]nder no circumstances does the WPA grant the district court jurisdiction to entertain a whistleblower cause of action brought directly before it in the first instance." See Stella v. Mineta, 284 F.3d 135, 142 (D.C. Cir. 2002).

Under the CSRA, after a federal employee alleging a WPA violation files her claim with the OSC, the OSC investigates and may petition the MSPB on the employee's behalf if the OSC finds a violation. 5 U.S.C. §§ 1214(a)(3), 1221. If the OSC finds no violation, the employee, herself, may seek review before the MSPB. Id. The decision of the

MSPB then is appealable to the Federal Circuit. 5 U.S.C. § 7703. However, as discussed in Issue 1, if the employee raises a "mixed case claim," that is, one alleging both WPA and Title VII claims, the employee may seek relief either by filing a complaint with the agency's EEO department, or by appealing directly to the MSPB. 5 U.S.C. § 7702.

Here, Hendrix failed to include in any of her EEO complaints what disclosures she made that she now contends were protected under the WPA. See Willis v. Dep't of Agriculture, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (explaining as persuasive authority that an employee failed to exhaust his administrative remedies when he failed to set forth the disclosures he believed were protected). Thus, to exhaust her administrative remedies, Hendrix was required to seek review of the OSC's decision before the MSPB. See 5 U.S.C. §§ 1214(a)(3), 1221. Because the OSC issued a decision dismissing Hendrix's WPA claims, and because Hendrix did not seek review of this decision with the MSPB, the district court correctly determined that she failed to exhaust her administrative remedies. Cf. Kelliher v. Veneman, 313 F.3d 1270, 1274 (11th Cir. 2002) (concluding that district court had jurisdiction to review a "mixed case claim" where the employee had exhausted his claims before the MSPB).

Furthermore, to the extent Hendrix is arguing for the first time on appeal that the district court should have equitably tolled these exhaustion requirements because she was confused by notices she received based on her concurrent filings with the EEO, we decline to review this legal argument for the first time on appeal. See Four Seasons Hotels, 377 F.3d at 1168-69. Regardless, even if we were to conclude that principles of equitable tolling were applicable to relieve Hendrix from her failure to exhaust her WPA claims, see Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982) (holding that the prerequisite of timely contacting an EEO counselor

is subject to waiver, estoppel, and equitable tolling), Hendrix has failed to explain why, despite any misunderstandings she might have had based on notices she received regarding her concurrent filings of EEO complaints, she attempted, but could not discover, the proper method for exhausting her remedies. Thus, she failed to show she was entitled to this remedy. The district court, therefore, also did not err in granting the defendants summary judgment as to Hendrix's WPA claims.

**Issue 3: Section 1985(1) claim**

Hendrix argues that the district court erred in concluding that her § 1985(1) claim was preempted by the CSRA. Relying on the fact that 26 U.S.C. § 7804 was amended in 1998, she argues that she now has a right of action and that this right of action is in addition to her rights under Title VII and the WPA.

As the district court discussed in its order granting summary judgment, the CSRA protects federal civil servants "by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." Bush v. Lucas, 462 U.S. 367, 385, 103 S.Ct. 2404, 2415, 76 L.Ed.2d 648 (1983). The CSRA, thus, overhauled the civil service system and created anew framework for evaluating adverse employment actions against federal employees. United States v. Fausto, 484 U.S. 439, 443, 108 S.Ct. 668, 671, 98 L.Ed.2d 830 (1988).

Therefore, outside of Title VII claims, both the Supreme Court and this Court have concluded generally that the CSRA provides the exclusive procedure for challenging federal personnel decisions. Fausto, 484 U.S. at 443, 454-55, 108 S.Ct. at 671, 677 (holding that the comprehensive

nature of the CSRA precludes relief under the Back Pay Act, even though the employee was not entitled to judicial review under the CSRA); Broughton, 861 F.2d at 643 (explaining that "Congress intended the CSRA to provide an exclusive procedure for challenging federal personnel decisions"). Similarly, in Bush, the Supreme Court refused to allow a federal employee to maintain, under the First Amendment, a Bivens actions against the agency for which he worked. Bush, 462 U.S. at 388-90, 103 S.Ct. at 2417.

In Stephens v. Dep't of Health and Human Services, 901 F.2d 1571 (11th Cir. 1990), we examined whether the CSRA provided the exclusive remedy for a federal employee who was challenging alleged prohibited personnel practices through a Bivens action. See id. at 1572. Rejecting the employee's argument that, because the CSRA does not state that it is exclusive, we should not restrict judicial review, we determined that the CSRA was the plaintiff's exclusive remedy. See id. at 1575-76. We explained that, although a Bivens action is available where a plaintiff has no alternative means of obtaining redress and there are no "special factors counseling hesitation," we have not created additional Bivens remedies "when the design of a [g]overnment program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administrations." See id. at 1577 (quotations and marks omitted); see also Lee v. Hughes, 145 F.3d 1272, 1273-74, 1277 (11th Cir. 1998) (holding that federal officer, who was excluded from CSRA review, could not bring, under the Fifth Amendment, a Bivens action); Hardison v. Cohen, 375 F.3d 1262, 1265-66 (11th Cir. 2004) (holding that medical resident of Department of Veteran Affairs could not bring a Bivens action for damages for wrongful discharge).

Although a review of our caselaw has not revealed authority directly addressing whether a federal employee may

challenge personnel decisions through a § 1985(1) claim, the Fourth Circuit in Hall v. Clinton, 235 F.3d 202 (4th Cir. 2000), determined, as persuasive authority, that a federal officer could not challenge what was essentially personnel decisions through civil actions brought under § 1985(1). See id. at 206. In reaching this conclusion, the Fourth Circuit recognized that the Supreme Court's holding in Bush, which dealt with the effect of the CSRA on the judicial implications of constitutional remedies, was distinguishable from the foreclosure of statutory claims. See id. Nevertheless, the Hall Court determined that "Congress intended that the CSRA would operate to the exclusion of all other statutory remedies for claims arising out of the federal employment relationship." See id. Applying this reasoning, as well as our analogous reasoning in denying Bivens claims relating to personnel problems, we conclude that the court did not err in determining that Hendrix's § 1985(1) claim challenging her employer's personnel decisions was preempted by the CSRA.

Furthermore, to the extent Hendrix is arguing that the court should have concluded that she had a private right of action, based on a 1998 amendment to 26 U.S.C. § 7804, this argument is without merit. Congress passed Public L.No. 105-206, 112 Stat. 685 (1998), § 1203(a), codified as a note to 26 U.S.C. § 7804, to authorize the Commissioner of the IRS to terminate any IRS employee for cause on charges of misconduct "if there is a final administrative or judicial determination that [the] employee [among other things, violated the federal constitutional rights of a taxpayer] in the performance of the employee's official duties." *Id.*, § 1203(a). "Any determination of the Commissioner of Internal Revenue under this subsection may not be appealed in any administrative or judicial proceeding." Id., § 1203(c)(3). Hendrix, however, has failed to cite authority in support of her claim that this section created a private right of action. Indeed, because § 1203(c)(3) bars judicial review of actions

taken under it, and given the statute's express non-delegable grant of discretion to the Commissioner of the IRS, Hendrix arguably would lack standing to bring a claim for relief under it even if she could show that Congress had create a right of action under it. See id. Moreover, as the defendants assert, Hendrix's last contested act, that is, her termination, occurred in January 1998, and Hendrix has failed to cite to authority showing that Congress intended for this statute be retroactively applicable. Thus, the district court did not err in granting the defendants summary judgment as to Hendrix's § 1985(1) claim.[9]

**Issue 4: Tort claims**

Hendrix argues that the district court erred by misapplying the standard of review applicable to summary judgment motions in reviewing the U.S. Attorney's scope-of-employment certification. Hendrix also specifically contends that the court erred by (1) holding a hearing to determine whether the individual defendants' acts were within the scope of their employment, and (2) restricting her testimony during that hearing to the period of time after the acts at issue occurred. Hendrix argues that the court's ultimate determination was erroneous because the alleged acts were intentionally taken and fell outside the scope of the individual defendants' employment. Finally, Hendrix contends that the court erred in concluding that, after the government was

9 Alternatively, we could affirm based on the fact that the defendants correctly argued in response to summary judgment that Hendrix's addition of her § 1985(1) claim in August 2001, was more than two years after her employment with the IRS was terminated in January 1998, and, thus, untimely. See Walker v. Mortham, 158 F.3d 1177, 1193 (11th Cir. 1998) (explaining that we "may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted, or rejected by the district court"); Rozar v. Mullis, 85 F.3d 556, 561 (11th Cir. 1996) (holding that Georgia's two-year personal-injury limitations period applies to § 1985 claims).

substituted for the individual defendants, her tort claims against the government were preempted by the CSRA.

The remedy provided by the FTCA, as amended by the Westfall Act, to a plaintiff for an injury arising from acts of a federal employee who was acting within the scope of his employment, is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. § 2679(d)(1). Thus, upon the U.S. Attorney's certification of scope-of-employment, the action "shall be deemed an action against the United States . . ., and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(2). However, both the Supreme Court and this Court have determined that, upon objection by the plaintiff, the Attorney General's scope-of-employment certification is reviewable by the district court. See Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 436-37, 115 S.Ct. 2227, 2237, 132 L.Ed.2d 375 (1995); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1543 (11th Cir. 1990). Indeed, we concluded in S.J. & W. Ranch that, because the district court's review of the issue of scope of employment is de novo, remand was necessary for the district court to conduct an evidentiary hearing. See S.J. & W. Ranch, 913 F.2d at 1543-44.

In conducting this de novo review, "[t]he question of whether a given act falls within the scope of employment is highly fact-specific, and turns on the unique circumstances of the case at bar." Bennett v. United States, 102 F.3d 486, 489 (11th Cir. 1996). "The burden of altering the status quo by proving that the employee acted outside the scope of employment is . . . on the plaintiff." Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996) (quotation and marks omitted). Moreover, "[t]he question of whether an employee's conduct was within the scope of his employment is governed by the law of the state where the incident occurred." Id.

Under Georgia law, the law applicable in the instant action, "[e]very person shall be liable for torts committed by his . . . servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." O.C.G.A. § 51-2-2. An employer is liable for negligent or intentional torts committed by an employee only if the torts were committed in furtherance of, and within the scope of, the employer's business. Piedmont Hospital, Inc. v. Palladino, 580 S.E.2d 215, 217 (Ga. 2003). Indeed, an employer may not be held liable for the wilful or malicious acts of an employee if these acts were not in the course of his employment and within its scope, and the fact that the employee had some personal motive is immaterial. Andrews v. Norvell, 15 S.E.2d 808, 810-11 (Ga. Ct. App. 1941).

On the other hand, an employer cannot be held liable on the basis of respondeat superior if the employee's acts (1) were committed for purely personal reasons associated solely with the employee's own gratification, and (2) were entirely disconnected from the scope of the employee's employment. Piedmont Hospital, 580 S.E.2d at 217. The Georgia Supreme Court concluded in Piedmont Hospital that the hospital was not vicariously liable under the theory of respondeat superior to a patient for a hospital employee's alleged misconduct in manipulating the patient's genitals during the patient's hospital stay because (1) these acts were committed for purely personal reasons associated solely with the employee's own gratification, and (2) were entirely disconnected from the scope of the employee's employment with the hospital. Id.

Applying this law in the instant case, the district court properly conducted a de novo evidentiary hearing after Hendrix objected to the Attorney General's certifications of scope-of-employment. See Gutierrez, 515 U.S. at 436-37, 115 S.Ct. at 2237; S.J. & W. Ranch, 913 F.2d at 1543. During this hearing, Hendrix contended that the individual defendants:

(1) made defamatory statements to an Assistant U.S. Attorney, for the purpose of having Hendrix criminally prosecuted; (2) improperly used an alternative ranking system to deny Hendrix a position as an IE; (3) improperly gave favorable tax treatment to persons in exchange for negative letters relating to Hendrix; (4) retaliated against Hendrix by changing her employment records and interfering with investigations; (5) misled a U.S. Senate oversight committee and prematurely ended an investigation; (6) harassed her after she was reassigned to another group within the IRS; (7) attempted to have her fired by placing her in situations where she would improperly disclose taxpayer information; and (8) continued to harass her after her employment with the IRS terminated.

As the district court determined, however, these alleged tortious acts, unlike the facts in Piedmont Hospital, involved personnel decisions and acts Hendrix's supervisors took in furtherance of, and within the scope of, the IRS's business. See Piedmont Hospital, 580 S.E.2d at 217. Thus, even assuming as true Hendrix's contention that at least some of the individual defendants acted maliciously, the acts were committed within the scope of the defendant's employment and the defendant's intent was immaterial. See Andrews, 15 S.E.2d at 810.

Finally, after substituting the government for the individual defendants, the district court properly concluded that summary judgment was warranted as to Hendrix's tort claims against the government. As discussed in Issue 3, outside of Title VII claims, the CSRA provides the exclusive procedure for challenging federal personnel decisions. See Fausto, 484 U.S. at 454-55, 108 S.Ct. at 677; Broughton, 861 F.2d at 643. Indeed, in Broughton, we examined a federal employee's state tort law claims alleging malicious interference with employment and conspiracy to interfere with employment, and determined that it fell within the

scope of prohibited personnel practice as addressed in 5 U.S.C. § 2302(b), and concluded, therefore, that it was preempted by the CSRA. See Broughton, 861 F.2d at 640-44. Because the alleged tortious acts Hendrix identified during the evidentiary hearing are all prohibited under the CSRA, these acts, similar to those alleged in Broughton, were preempted by the CSRA. See 5 U.S.C. § 2302(b)(1)(A) (prohibiting personnel- practice discrimination in violation of Title VII); 5 U.S.C. § 2302(b)(2) (prohibiting the solicitation of any recommendation or statement with respect to an individual who is under consideration for a personnel action except as specifically provided); 5 U.S.C. § 2302(b)(4) (prohibiting willful obstruction of any person with respect to that person's right to compete for employment); 5 U.S.C. § 2302(b)(8) (prohibiting retaliation for protected disclosures of information). Thus, the district court also did not err in granting the defendants summary judgment on Hendrix's tort claims.

Accordingly, we conclude that the district court properly granted summary judgment as to all of Hendrix's claims in her Third Amended Complaint. We, therefore, affirm.

**AFFIRMED.**

# B

Case 1:97-cv-03579-RWS Document 251 Filed 02/22/2005

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| SARAH HENDRIX, | : | |
| Plaintiff, | : | |
| v. | : | CIVIL ACTION NO. 1:97-CV-3579-RWS |
| JOHN SNOW, Secretary of the Department of Treasury of the United States of America, et al., | : | |
| Defendants. | : | |

## ORDER

Now before the Court for consideration are Defendant United States' Motion to Dismiss or for Summary Judgment [207-1], Defendant John W. Snow's Motion for Summary Judgment [209-1], Defendants Ty Ayers, Wanda Edmundson, Michael McBride, John Butkovich, William Zachery, and Richard Byrd's Motion for Summary Judgment [211-1] and Defendants' Motion to Strike Plaintiff's Documents filed January 7, 2005 [246-1]. After considering the entire record and the arguments of the parties, the Court enters the following Order.

## Factual Background

This case arises out of Plaintiff Sarah Hendrix's employment with the United States Department of the Treasury, Internal Revenue Service ("IRS") where she was employed as a Revenue Officer. (Pl.'s Compl. [1] ¶ 2.) The procedural history of this case is long and complex and is set forth in detail in this Court's Order entered June 30, 2004 (the "June 30 Order"). The Court will not repeat it here except as necessary. The following facts are taken from Plaintiff's Complaint and amendments thereto. Additional facts are incorporated into the following discussion.

Plaintiff's trouble began when she requested and received a transfer from the Manhattan District to the Georgia District of the IRS in 1994. (Id. ¶ 4.) Plaintiff, a white female, contends that shortly after her arrival and continuing through her employment, she was harassed and discriminated against because of her race and sex. (Id.) She also contends that she was retaliated against for making complaints and was wrongfully suspended in June 1996 (id. ¶ 5), and wrongfully terminated in January 1998. (Pl.'s Am. Compl. [12] ¶ 9.) Specifically, Plaintiff states that she was discriminated against

> with respect to compensation, working conditions, disciplinary actions, and employment opportunities by denying her application for positions for which she was and is qualified, by intentionally misusing an alternate ranking system in order to deny her the sought after position, denying Plaintiff benefits (Flexiplace and others) accorded other employees and giving Ms. Hendrix a false and negative performance evaluations [sic] in order to give a position to a black male who is not a CPA and was not qualified for the position . . . and by terminating and retaliating against Ms. Hendrix for complaining about discrimination against her and others.

(Pl.'s Second Am. Compl. [71] ¶ 11.) Plaintiff also asserts that Defendants retaliated against her for complaining about discriminatory acts taken by Defendant, filing complaints through the administrative process, contacting members of Congress, publicly speaking about discriminatory practices in the IRS, and contacting the news media about Defendants' actions. (Id. ¶ 17.)

Plaintiff filed numerous complaints with various agencies including the Equal Employment Office ("EEO") of the Department of the Treasury and the Office of Special Counsel ("OSC").[1] She also filed grievances through the National Treasury Employees Union ("NTEU").[2]

## I. Plaintiff's First EEO Complaint

Plaintiff first sought counseling from the Department of the Treasury EEO on June 6, 1996. (Defs.' Ex. 40.)[3] She filed her first complaint before the EEO, complaint number 96-2290MT, on August 5, 1996. (Defs.' Ex. 42.) In her complaint, Plaintiff asserted six primary claims.[4]

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number since the paragraphs of the affidavit are not individually numbered.

1 Plaintiff filed three separate responses to the three Motions for Summary Judgment filed by Defendants at docket numbers [238], [239], and [240]. Plaintiff filed a single set of exhibits as an attachment to these responses. The exhibits include a thirty-two page affidavit by Plaintiff and exhibits thereto. For simplicity, the Court will refer to these exhibits "Hendrix Aff. Ex. __." References to Plaintiff's affidavit will be to the page.

2 Plaintiff filed grievances through the NTEU in late 1995 through early 1996. (See Hendrix Aff. Exs. 42, 43, 48, 72, 93.) Neither party has addressed the specifics of Plaintiff's grievance complaints.

3 Defendants' evidence in support of their Motions for Summary Judgment are filed at docket numbers [207] and [211] with exhibits one through four filed at [207] and the remainder filed at [211]. For simplicity, the Court will refer to Defendants' exhibits as "Defs.' Ex. __."

4 Plaintiff identified eighteen individual issues. The EEO combined several of Plaintiff's individual issues into a more general claim for harassment from September 1995 until April 1996.

(Id.) Plaintiff complained that: (1) upon her January 1994 transfer to the Georgia District, she did not receive a position as an International Examiner which she was promised and that she was downgraded in her position; (2) that in April 1994 she was not advised that she could have been subject to criminal prosecution for providing false information regarding financial obligations; (3) that in April 1995 she was denied selection for an International Examiner position; (4) that she was subject to various instances of harassment from September 1995 until April 1996; (5) that on January 30, 1996, she was given a poor annual evaluation; and, (6) in July 1996, she was wrongfully suspended for two weeks. (Id.) Plaintiff's first EEO complaint specifically charged William Zachery, Mike McBride and Wanda Edmundson with wrongdoing.

The EEO requested that Plaintiff provide additional explanation regarding why she had not sought EEO counseling within the required time frame (forty-five days) of the alleged actions against her. Plaintiff responded in a letter dated December 13, 1996, that her allegations constituted a continuing pattern of illegal behavior, that she was under emotional distress from the death of her mother in January 1995, and that she did not learn of certain actions taken against her until she received replies to a Freedom of Information Act request. (Hendrix Aff. Ex. 89.) On January 15, 1997, Plaintiff was notified by the EEO that it was dismissing her claims one through five because they were untimely, explaining that she failed to seek counseling within the forty-five days required. (Hendrix Aff. Ex. 93; Defs.' Ex. 44.) The EEO concluded that the violations that Plaintiff complained of did not constitute a continuing pattern of

discrimination.[5] The letter notified Plaintiff that it constituted the final decision by the Department of the Treasury on the portions of her complaint which were being dismissed. Included with the letter was a notice of appeal rights which informed Plaintiff that she could file a civil action in district court within thirty (30) days or file an appeal with the Merit Systems Protections Board ("MSPB"). (Defs.' Ex. 44.) The notice specifically informed Plaintiff that she should not appeal with the Equal Employment Opportunity Commission ("EEOC"). Even so, Plaintiff appealed to the EEOC and received a letter by the EEOC dated March 17, 1997, acknowledging receipt of her appeal. (Hendrix Aff. Ex. 100.) By a letter dated October 30, 1997, the EEOC notified Plaintiff that it was dismissing her appeal because it had been filed in the wrong forum. (Defs.' Ex. 46.)

## II. Plaintiff's Subsequent EEO Complaints

It is clear that Plaintiff filed additional EEO complaints after the first one, but the exact sequence of Plaintiff's subsequent EEO complaints is not evident from the record. On July 10, 1997, Plaintiff received a 60-day "opportunity letter," a letter which apparently permitted Plaintiff sixty days to improve her performance and provided that in the event she did not improve, she may be terminated. Plaintiff then filed another EEO complaint, complaint number

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5 The EEO also rejected Plaintiff's contention that emotional distress prevented her from taking action and noted that she had filed numerous union grievances and conducted correspondence regarding those grievances during that time. The EEO further stated that Plaintiff had notice of her complaint prior to her Freedom of Information Act request. (Hendrix Aff. Ex. 93.)

97-1320, on July 24, 1997. (See Hendrix. Aff. Ex. 109.)[6] Although the record is not clear regarding the exact issues raised by Plaintiff in that complaint, by a letter dated August 27, 1997, the EEO dismissed Plaintiff's complaint because she had previously raised those issues in another proceeding. (Id.) Although Plaintiff contends that the EEO erroneously concluded that she had raised those issues, (Hendrix Aff. at 29; Ex. 110), there is no evidence that she ever appealed this ruling.

Plaintiff's was terminated effective December 29, 1997. (Defs.' Ex. 49.) On March 4, 1998, Plaintiff filed another EEO complaint, complaint number 98-1171M, for wrongful termination. (Defs.' Ex. 50.)

## III. Plaintiff's Complaint to the OSC

Plaintiff filed a complaint with the OSC on August 14, 1997. (Defs.' Ex. 3 at 93-98.) Plaintiff's complaint asserted that she had received the 60-day opportunity letter in retaliation for a letter she wrote on May 6, 1997. By a letter dated November 17, 1997, the OSC declined to investigate Plaintiff's charges of gender and race discrimination and retaliation because she had already asserted those complaints before the EEO. (Defs.' Ex. 3 at 84-86.) Furthermore, the OSC found that Plaintiff had failed to state a violation of §§ 2302(b)(8), 2302(b)(11) for retaliation related to whistleblowing activities. Plaintiff did not appeal this decision of the OSC to the MSPB.

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6 Plaintiff's affidavit also asserts that she filed an EEO complaint number 97-1372. Plaintiff has not, however, referenced or attached a copy of that EEO complaint and the Court has not been able to identify it in the record. The only reference to that complaint is a memorandum from Plaintiff to Eva Kinnebrew indicating that she would withdraw the portion of her complaint raising wrongful termination, since she had not yet been terminated. (See Hendrix Aff. Ex. 117.)

Plaintiff filed her initial complaint [1] on November 28, 1997, and asserted claims under Title VII for race and sex discrimination and retaliation. On June 25, 1998, she filed an unopposed motion for leave to amend her complaint [10] to add her claim of wrongful termination. The Court granted Plaintiff's Motion for Leave to Amend by an Order dated July 20, 1998 [11]. The Court subsequently granted Plaintiff's motion for leave to file a second amended complaint (Order of August 9, 2001 [70] at 2.) Plaintiff's Third Amended Complaint was filed on August 13, 2004 [168].

Plaintiff's Complaint and amendments thereto assert claims against John Snow, in his capacity as the Secretary of the Department of Treasury, and current and former IRS employees including Wanda Edmundson, Michael McBride, Michael Butkovich, William Zachery, Ty Ayers, and Richard Byrd (collectively "Individual Defendants"). Plaintiff alleges: (1) discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e; (2) violation of the Whistleblower Protection Act, 5 U.S.C. § 1221; (3) that Defendants engaged in a conspiracy to violate her civil rights in violation of to 42 U.S.C. § 1985(1); and (4) Intentional Infliction of Emotional Distress. Plaintiff has requested expenses of litigation, attorneys' fees and costs.

## Discussion

As a preliminary matter, Defendants have moved to strike Plaintiff's documents filed on January 7, 2005 as untimely. Defendants Motion to Strike [246-1] is hereby **DENIED**.[7]

7 Defendants requested additional time to reply if the Court denied their motion to strike. Because the Court does not find that a reply is necessary, the Court will not permit additional time for a reply.

Plaintiff's claims arise out of her employment with the IRS and challenge actions taken against her in the course of her employment with a federal agency. Plaintiff has asserted claims against the United States and against current and former federal employees. Defendant United States has moved to dismiss Plaintiff's complaint, or in the alternative for summary judgment. Defendants John Snow and the Individual Defendants have also moved for summary judgment.

## I. Procedural Standards

Federal Rule of Civil Procedure 12(b)(6) empowers the Court to grant a defendant's motion to dismiss when a complaint fails to state a claim upon which relief can be granted. In considering whether to grant or deny such a motion, the Court may look only to the pleadings. Fed. R. Civ. P. 12(b). In addition, the pleadings are construed broadly so that all facts pleaded therein are accepted as true, and all inferences are viewed in a light most favorable to the plaintiff. Cooper v. Pate, 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964); Conner v. Tate, 130 F. Supp. 2d 1370, 1373 (N.D. Ga. 2001). Thus, a motion to dismiss should be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); see Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992). Motions to dismiss are disfavored and are rarely granted. Gasper v. La. Stadium & Exposition Dist., 577 F.2d 897, 900 (5th Cir. 1978); Woodham v. Fed. Transit Admin., 125 F. Supp. 2d 1106, 1108 (N.D. Ga. 2000).

In contrast, summary judgment is appropriate only

when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non-movant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The Court will evaluate each of Plaintiff's causes of action as well as Plaintiff's request for fees and costs.

## II. Title VII

Plaintiff has asserted claims for violations of Title VII, 42 U.S.C. § 2000e, in Counts I and II of her Complaint. Plaintiff contends that she was discriminated against on the bases of race and sex and that she was retaliated against for making EEO complaints.

Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment. Brown v. Gen. Servs. Admin., 425 U.S. 820, 835, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976). In Brown, the plaintiff was employed by the General Services Administration ("GSA") and alleged that he was discriminated against based on his race when he was denied promotions. Id. at 822. He filed a complaint with the EEO office of the GSA, received a final decision and

then attempted to file suit in federal district court forty-two days later. Id. at 823. The trial court dismissed the plaintiff's claim for failure to file within thirty days and the Supreme Court held that Title VII provided the exclusive remedy for the plaintiff's discrimination claims. The Court held that a plaintiff may not evade the rigorous exhaustion requirements and time limitations by putting a different label on the pleadings. Id. at 833. The Court further stated that "[i]t would require a suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." Id. It is evident, therefore, that if Plaintiff seeks relief for discrimination in her federal employment, she must do so under Title VII.

Before Plaintiff may seek relief in federal court, she must first exhaust her administrative remedies by seeking relief before the agency that has allegedly discriminated against her. Brown, 425 U.S. at 832; Grier v. Sec'y of the Army, 799 F.2d 721, 724 (11th Cir. 1986). More than a mere technicality, the exhaustion requirement is part of the congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel the primary responsibility for maintaining nondiscrimination in employment. Id. (internal quotation omitted). Plaintiff filed numerous EEO complaints with the Department of Treasury. The Court finds that Plaintiff may proceed in this action solely as to her claim for discrimination regarding her fifteen day suspension, which was raised in EEO complaint number 96-2290MT and filed by Plaintiff on August 5, 1996.

In her first EEO complaint Plaintiff identified eighteen issues which were grouped into six claims by the

EEO.[8] The EEO dismissed all of Plaintiff's claims except the suspension claim by a final decision dated January 15, 1997. Plaintiff was notified that she could file an action in district court within thirty days or she could appeal the decision to the MSPB. Plaintiff did neither. Instead, Plaintiff appealed the decision to the EEOC, even though the notice specifically stated that she should not appeal the decision to the EEOC. By the time Plaintiff filed suit, in November 1997, the time period had long run for her to file an action in district court.[9] Therefore, any of Plaintiff's claims that were dismissed by the EEO in the January 15 Letter are time barred. Plaintiff's EEO complaint number 97-1320 was dismissed by a decision dated August 27, 1997. Even if the Court were able to identify the claims presented in that complaint, it would also be time barred.[10] Finally, Plaintiff's EEO complaint number 98-1171T was filed on March 4, 1998 and asserted a charge

8 Plaintiff filed both allegations of discrimination and objections to certain adverse employment decisions. Therefore, her complaint is a "mixed case" governed by 5 U.S.C. § 7702. McAdams v. Reno, 64 F.3d 1137, 1141 (8th Cir. 1995) ("A comprehensive statutory and regulatory scheme governs the processing of mixed cases.").

9 Plaintiff provides no explanation as to why she appealed to the EEOC rather than filing in district court or appealing to the MSPB, other than confusion regarding the proper agency with which to file. The Court is aware that the procedural requirements are complex. See McAdams, 64 F.3d at 1141 (noting that the "requirements for processing employment discrimination claims are complex and merit careful attention by a claimant"). The savings provision of 5 U.S.C. § 7702(f) may have permitted Plaintiff to proceed with an appeal to the MSPB after learning that she had filed with the wrong agency. See 5 U.S.C. § 7702(f) (stating that if an employee timely files an appeal with the wrong agency, the employee shall be treated as having timely filed the appeal as of the date it is filed with the proper agency). Nothing in that provision, however, even suggests that this would permit an untimely complaint before the district court. See Buckser v. E.P.A., 45 M.S.P.B. 274, 279 (1990) (stating that United States District Court is not an "agency" within the meaning of 5 U.S.C. § 7702(f)).

10 As discussed above, Plaintiff would have had thirty days within which to file in district court. Her initial Complaint in this action was not filed until November 28, 1997.

of wrongful termination. On June 25, 1998, Plaintiff filed a Motion for Leave to Amend her Complaint in this action to include the charge of wrongful termination. Pursuant to 5 U.S.C. § 7702, Plaintiff may file an action in district court on the 120th day following the filing of an EEO complaint if the agency has not yet issued a decision. 5 U.S.C. § 7702(e)(1)(A); see McAdams, 64 F.3d at 1142. Plaintiff filed her amended complaint 113 days after submitting her EEO complaint. By failing to await the decision of the EEO or waiting the required 120 days, Plaintiff has failed to exhaust her administrative remedies. See Matthews v. Brownlee, 347 F. Supp. 2d 1163, 1166-67 (M.D. Ala. 2004) (noting that plaintiff failed to exhaust administrative remedies where she withdrew her complaint early and proceeded to federal court).[11]

**A. Discrimination**

As stated above, the Court has found that Plaintiff exhausted her administrative remedies as to her claim that the fifteen day suspension she received in July 1996 was the result of discrimination based on race, sex or retaliation. Therefore, the Court reviews the merits of this claim under legal framework established under Title VII.

Title VII makes it unlawful to discriminate against any individual with respect to her employment because of the individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-(a). The United States Supreme Court outlined the requirements for proving employment

11 Plaintiff's Amended Complaint asserts that an individual from the EEO contacted Plaintiff's then counsel to permit her to file an Amended Complaint with the Court asserting the termination claim. Plaintiff has presented no authority, and the Court has found none, that would permit an agency to confer jurisdiction upon the Court where it is in derogation of the plain statutory language.

discrimination using circumstantial evidence in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the McDonnell Douglas analysis, a plaintiff first must establish a prima facie case of discrimination. Id. at 802; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 207 (1981); see Benson v. Tocco, Inc., 113 F. 3d 1203, 1207 (11th Cir. 1997) (plaintiff must produce sufficient evidence to support an inference that the employer based its decision on an illegal criterion to establish prima facie case).

First of all, the Court notes Plaintiff's almost wholesale failure to identify any specific facts in response to Defendants' Motions for Summary Judgment. To be sure, Plaintiff has filed voluminous exhibits and depositions with the Court. What she has failed to do, however, is to identify specific evidence in support of her assertions. For instance, in her brief in response to Defendants' Motion for Summary Judgment regarding claims under Title VII, Plaintiff states that she "counters almost every statement discussed under this topic with supportable facts in her Affidavit, in Plaintiff's Answers to First Set of Interrogatories and in Plaintiff's October 19, 2004 Deposition." (Pl.'s Opp'n to Def. Sec'y of the Treasury of the United States Mot. for Summ. J. [239] at 28.) She did not, however, actually support any of these alleged "specific facts" with citations to the record. It is not the Court's duty to comb the record to attempt to find reasons to deny a motion for summary judgment. Powers v. CSX Transp., Inc., 190 F. Supp. 2d 1284, 1286 n.2 (S.D. Ala. 2002); see Local Rule N.D. Ga. 56.1(B)(3) (stating that all documents and other record materials relied upon by a party shall be clearly identified for the court including where

appropriate, dates and specific page numbers).[12]

Plaintiff's complaint asserts disparate treatment on the basis of race and sex in violation of Title VII. To show disparate treatment, a plaintiff must show that she was similarly situated to others but was treated differently in spite of similar misconduct, the same workplace rules, and the same decision-making supervisor. Knight v. Baptist Hosp., Inc., 330 F.3d 1313, 1315 (11th Cir. 2003); see Holifield v. Reno, 115 F. 3d 1555, 1562 (11th Cir. 1992) (describing principles). Defendants contend that Plaintiff has failed to state a prima facie case because she has not identified a similarly situated employee outside of her protected class who engaged in similar conduct but who received more favorable treatment. The Court agrees. Plaintiff's claims for discrimination must fail because she has wholly failed to come forward with any evidence to support her assertion that she was discriminated against on the basis of race or sex. Plaintiff has not identified any other employee outside of her protected class who received more favorable treatment than she did nor has she come forward with any other evidence tending to support the inference that her suspension was based on protected characteristics under Title VII. Holifeld, 115 F.3d at 1562 ("If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present.").

Plaintiff has done nothing more than deny that she deserved the suspension. In her response to Defendants' Statement of Facts, she simply states "Plaintiff denies that she is guilty of either act" that allegedly warranted the

12 Even so, the Court has reviewed Plaintiff's affidavit and the supporting exhibits. Additionally, the Court has attempted to broadly construe Plaintiff's assertions and to locate the evidence that Plaintiff refers to generally in her papers where ever possible, even though the Court has no obligation to do so.

suspension. (Pl.'s Resp. to Defs.' Statement of Facts [240] ¶ 16.) Even if Plaintiff could show that she did not deserve to be suspended, she has failed to come forward with any evidence to suggest that the reason for the suspension was discriminatory. Plaintiff has presented no other evidence on discrimination as to her suspension claim. Even viewing the evidence in the light most favorable to Plaintiff, Summary Judgment is due to be granted as to this claim.

**B. Retaliation**

Plaintiff also contends that Defendants retaliated against her in violation of Title VII. To make a prima facie case for retaliation, a plaintiff must show: (1) she engaged in a statutorily protected activity; (2) her employer took an adverse employment action; and (3) the adverse employment action was causally related to the protected activity. Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 959 (11th Cir. 1997). In her response to Defendants' Statement of Material Facts, Plaintiff unequivocally states that she "had not filed any EEO complaints at the time of the 15-day suspension." (Pl.'s Resp. to Individual Defs. Statement of Material Facts [240] ¶ 16.)[13] Moreover, Plaintiff has not identified any other record evidence to demonstrate that she engaged in protected activity prior to the suspension. Therefore, the Court finds that summary judgment is due to be **GRANTED** as to Plaintiff's Counts I and II regarding violation of Title VII.

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13 Plaintiff's suspension was proposed on March 18, 1996. (Defs.' Ex. 38.) Plaintiff did not even contact an EEO counselor before June 1996.

## III. Whistleblower Protection Act

Plaintiff's Complaint asserts a claim against the United States and the Individual Defendants for violation of the Whistleblower Protection Act, 5 U.S.C. § 1221. Plaintiff contends that she was subjected to harassment, intimidation, and adverse personnel actions based on bona fide whistleblowing reports disclosing government mismanagement and wrongdoing. The Whistleblower Protection Act of 1989 ("WPA") amended the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 91 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C. ) ("CSRA"). See Robinson v. Rubin, 77 F. Supp. 2d 784, 792-93 (S.D. Tex. 1999).[14]

Although it is unnecessary for the purpose of this discussion to trace the entire history of the CSRA, when it was created, the CSRA comprehensively overhauled the civil service system and created an elaborate new framework for evaluating adverse employment actions against federal employees. United States v. Fausto, 484 U.S. 439, 443, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988) (quoting Lindahl v. OPM, 470 U.S. 768, 773, 105 S. Ct. 1620, 84 L. Ed. 2d 674 (1985)). The CSRA protects federal civil servants "by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures– administrative and judicial– by which improper action may be redressed." Bush v. Lucas, 462 U.S. 367, 385, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983).

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14 Plaintiff, as an employee of the IRS, was subject to the CSRA. Plaintiff states in her Second Amended Complaint [71] that she was an employee in a "covered position" working in a "covered agency" and that the Defendants actions constitute "personnel actions." (See Second Am. Compl. ¶ 8-10.)

It is well-established that the CSRA provides the exclusive procedure for challenging federal personnel decisions. Broughton v. Courtney, 861 F.2d 639, 643 (11th Cir. 1988) ("Congress intended the CSRA to provide an exclusive procedure for challenging federal personnel decisions"); see Fausto, 484 U.S. at 447 (comprehensive nature of CSRA precludes relief under Back Pay Act, even though employee was not entitled to judicial review under CSRA); Bush, 462 U.S. at 388-89 (declining to create a new judicial remedy where Congress already created an elaborate remedial system). The exclusivity of the CSRA remedy likewise applies to claims brought pursuant to the WPA. "Under no circumstances does the WPA grant the District Court Jurisdiction to entertain a whistleblower cause of action brought directly before it in the first instance." Stella v. Mineta, 284 F.3d 135, 142 (D.C. Cir. 2002); Robinson, 77 F. Supp. 2d at 793 (stating that the WPA does not give an aggrieved employee the right to seek relief directly in federal district court).

Since it is evident that a plaintiff may not directly assert a cause of action before the district court under the WPA, the Court must next determine when judicial review of a WPA claim is proper. The WPA provides protection to federal employees against agency reprisal for whistleblowing activity, such as disclosing illegal conduct, gross mismanagement, gross waste of funds or actions presenting substantial dangers to health and safety. See 5 U.S.C. § 2302(b)(8); Stella, 284 F.3d at 142. An employee who believes that she has been the victim of an unlawful reprisal must first bring her claim to the OSC. Stella, 284 F.3d at 142. The OSC investigates and if it finds a violation it may petition the MSPB on her behalf, or if no violation is found the employee may decide to bring the action before the

MSPB. Id.; see 5 U.S.C. §§ 1221, 1214(a)(3). The decision of the MSPB is appealable to the Federal Circuit. 5 U.S.C. § 7703.

Plaintiff asserts that she has exhausted her administrative remedies by filing complaints with the OSC and the agency EEO department. Plaintiff contends that hers is a "mixed case" and that this Court may properly review her claims. In a "mixed case" involving both whistleblower and discrimination claims, an employee may choose to seek relief by filing a complaint with the agency's EEO department or by appealing directly to the MSPB. 5 U.S.C. § 7702; see Robinson, 77 F. Supp. 2d at 793.

Even though Plaintiff's EEO complaints may be considered to present a "mixed case" Plaintiff's WPA claims are not properly reviewable by this Court. First of all, Plaintiff never raised her whistleblower claims in any of the several EEO complaints she filed. In order to exhaust her remedies through the administrative process, Plaintiff is required to explicitly detail the specific disclosures she made that she contends were protected under the WPA. See Willis v. Dep't of Agriculture, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (holding that employee failed to exhaust administrative remedies where he failed to explicitly raise disclosures he believed were protected in his original complaint). While Plaintiff's brief identified certain disclosures she contends were made to United States Congressmen and Senators, Plaintiff's complaints before the EEO do not detail these specific disclosures. (See Pl.'s Resp. to Individual Defs. Statement of Material Fact ¶ 15.) Moreover, Plaintiff admits that she did not exhaust her WPA claims before the EEO. She states that she "did not mention claims in violation of WPA because she was still trying to resolve issues in house at the

IRS at that time." (Id.)[15] Therefore, Plaintiff failed to exhaust her administrative remedies regarding her WPA claims before the EEO. Even if Plaintiff's complaint could be read to have raised these specific disclosures, as discussed above in relation to Plaintiff's Title VII claims, Plaintiff's petition before this Court to review her "mixed case" EEO complaints is untimely.

Plaintiff also contends that she has exhausted administrative remedies by filing her complaints with the Office of Special Counsel. Even assuming that Plaintiff could maintain concurrent actions for discrimination before the EEO department and whistleblower claims before the OSC and MSPB, this Court may not properly review the claims presented to the OSC. See Robinson, 77 F. Supp. 2d at 793 (dismissing plaintiff's claims because employee did not raise whistleblower claims in EEO complaints and did not seek administrative relief under the procedures set forth to appeal to the OSC and MSPB). Plaintiff's complaint with the OSC was filed August 14, 1997. By a letter dated November 17, 1997, the OSC dismissed Plaintiff's discrimination claims because she had already brought them in her EEO complaint. The OSC also dismissed her whistleblower claims because it found no basis for them. It is evident that Plaintiff's claims as filed directly with the OSC are not properly before this Court because Plaintiff never appealed the decision of the OSC. Even if she had appealed the OSC's finding that she was not entitled to relief, she would have been required to appeal that finding to the MSPB. Then, if the MSPB denied her relief, she would have been required to seek review

15 Plaintiff apparently relies on her claims before the OSC to demonstrate exhaustion.

before the Federal Circuit.[16] This Court has no basis to review Plaintiff's claims under the WPA. C.f. Kelliher v. Veneman, 313 F.3d 1270 (11th Cir. 2002) (district court had jurisdiction to review mixed case where employee had exhausted claims before the MSPB). Accordingly, Plaintiff's Count III is due to be **DISMISSED**.

16 Plaintiff contends that because hers was a "mixed case" she was not required to appeal to the MSPB. That may have been true if she had decided to pursue her WPA claims along with her discrimination claims in her EEO complaint. Plaintiff has admitted that she did not choose that route and only filed her WPA claims with the OSC. Having selected the manner in which to proceed, she is required to fully exhaust that administrative procedure, which does require an appeal to the MSPB prior to any judicial review. The fact that Plaintiff filed numerous overlapping complaints in various fora did not excuse her from fully exhausting the procedural routes she chose.

## IV. Section 1985(1)

Plaintiff's Count IV asserts a claim for conspiracy to interfere with civil rights under 42 U.S.C. § 1985(1). Plaintiff contends that the Individual Defendants deprived her of her civil rights by acts of intimidation and bad faith and conspired to prevent her discharge of duties as an employee of a federal office.

Section 1985(1) proscribes conspiracies that interfere with the performance of official duties by federal officers. Kush v. Rutledge, 460 U.S. 719, 724, 103 S. Ct. 1483, 75 L. Ed. 2d 413 (1983). Plaintiff may not maintain a separate cause of action under 42 U.S.C. § 1985(1), however, because as the Court discussed above, the CSRA is the exclusive remedy for claims arising out of the federal employment relationship. The comprehensive administrative procedure set forth by Congress in the CSRA forecloses Plaintiff from bringing her claims arising out of the federal employment relationship under separate causes of action for violations of federal constitutional and statutory rights. Fausto, 484 U.S. at 455 (holding that comprehensive system for reviewing personnel action taken against federal employee prevents judicial review under the Back Pay Act); Bush, 462 U.S. at 386 (holding employee could not assert claim for damages for violation of First Amendment outside of CSRA); Hall v. Clinton, 235 F.3d 202, 206 (4th Cir. 2000) (CSRA precludes Bivens claims and claims under § 1985(1)); Stephens v. Dep't of Health and Human Servs., 901 F.2d 1571, 1576 (11th Cir. 1990) (CSRA is exclusive remedy and precludes Bivens claim); Wells v. Fed. Aviation Admin., 755 F.2d 804, 810 (11th Cir. 1985) (Bivens action for violation of Fifth Amendment precluded by remedies provided under CSRA); see Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S.

366, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979) (holding that deprivation of a right under Title VII cannot be the basis for a cause of action under 42 U.S.C. § 1985(3)).[17]

Although the bulk of the above cited cases arose in the context of a plaintiff employee seeking to file suit against individuals for constitutional violations pursuant to a Bivens claim, the Court finds that a similar analysis precludes Plaintiff's claim under § 1985(1). In Hall v. Clinton, 235 F.3d 202 (4th Cir. 2000), the Fourth Circuit discussed the unavailability of a Bivens action in the federal employment context. Id. at 204. Recognizing that the prior cases dealt with alleged constitutional violations, the Fourth Circuit stated that "Congress intended that the CSRA would operate to the exclusion of all other statutory remedies for claims arising out of the federal employment relationship." Id. at 206. Therefore, the court held that the comprehensive grievance procedures of the CSRA implicitly repealed all other then-existing statutory rights of federal employees regarding personnel decisions. Id. The Court finds this reasoning persuasive, consistent with the law of the Eleventh Circuit, and holds that Plaintiff may not evade the procedural requirements of the CSRA by bringing her claim under 42 U.S.C. § 1985. Plaintiff's claim for violation of § 1985(1) is due to be **DISMISSED**.

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17 Plaintiff's Response to Defendants' Motions for Summary Judgment suggest in various places that she may maintain Bivens actions against Individual Defendants. The authority cited above conclusively forecloses this avenue of relief to Plaintiff.

## V. Intentional Infliction of Emotional Distress

Plaintiff's Count V asserts a state law tort claim for Intentional Infliction of Emotional Distress. On November 2, 2004, Defendant United States filed its Notice of Substitution of United States as Defendant for Tort Claims Against Individual Capacity Defendants ("Notice of Substitution") [205] pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), 28 U.S.C. § 2679. The Notice contains a Certification by the United States Attorney that the individual defendants were acting within the scope of their employment at the time of the incident or incidents giving rise to Plaintiff's claims. Plaintiff objected and the Court held an evidentiary hearing on February 8, 2005.

### A. Scope of Employment

To determine whether an employee's conduct was within the scope of his employment, the Court must look to the law of the State where the alleged tortious conduct occurred. Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996). The plaintiff bears the burden of establishing that the challenged conduct exceeded the scope of employment. S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1543 (11th Cir. 1990). The district court reviews the matter de novo. Id.

Under Georgia law, in order to show that an employee is acting within the scope of employment, two elements must be shown. Piedmont Hosp., Inc. v. Palladino, 580 S.E.2d 215, 217 (Ga. 2003). First, the employee must be acting in furtherance of the employer's business. Id. Second, the employee must be acting within the scope of the employer's business. Id. If, however, a tortious act is committed for

purely personal reasons which are disconnected from the authorized business of the employer, the employee is not acting within the scope of employment. Id. Moreover, under Georgia law, an employer may be liable for the wilful or malicious acts of an employee done in the course of his employment and within its scope, although they are not done at the express direction of the employer or with his assent. Andrews v. Norvell, 15 S.E.2d 808, 810 (Ga. Ct. App. 1941).

At the hearing, Plaintiff set forth eight alleged tortious acts by the Individual Defendants which she contends were outside the scope of their employment. Plaintiff alleged that: (1) Defendants made defamatory statements to an Assistant United States Attorney in order to have her criminally prosecuted; (2) Defendants improperly used an alternate ranking system to deny her a position as an International Examiner; (3) Defendants engaged in a quid pro quo by exchanging favorable tax treatment to individuals for negative letters regarding Plaintiff; (4) Defendants retaliated against Plaintiff by changing records and interfering with investigations; (5) Defendants misled a United States Senate oversight committee and prematurely ended an investigation; (6) a prior manager harassed her after she was moved to another group within the IRS; (7) Defendants attempted to set-up Plaintiff to be fired by placing her in situations where she would improperly disclose taxpayer information; and (8) Defendants continued to harass her after the end of her employment with the IRS.[18]

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18 Plaintiff filed a supplemental affidavit after the hearing, docket no. [250]. In her supplemental affidavit, Plaintiff identifies twelve (12) "specific acts" which she contends were actions taken by the Individual Defendants outside the scope of their employment. These "specific acts" include the eight identified at the hearing and other instances Plaintiff recounted at the hearing. The Court has carefully considered Plaintiff's supplemental affidavit but finds that it is not necessary to elaborate on the specific grounds identified therein, because the allegations are substantially the same as those brought forward at the hearing.

Georgia courts have generally held that where an employee was at his employer's place of business and was generally engaged in doing the type of work for which he was hired, whether he was acting in the scope of employment is a question of fact. Miller v. Honea, 294 S.E.2d 629, 630 (Ga. Ct. App. 1982).[19] In that case, the plaintiff made disparaging remarks to the defendant regarding the defendant's performance as a union representative and an altercation between the plaintiff and defendant ensued. Id. at 629. The Georgia Court of Appeals recognized that the harsh words which provoked the assault arose out of the plaintiff's criticism of the defendant in his job duties and held that whether the resulting assault was in the scope of the defendant's employment was a question of fact. Id. at 630. "The theory that one may be a servant one minute, and the very next minute step aside and act in his individual capacity, and then the next minute step back into his capacity as a servant is too refined a distinction." Andrews, 15 S.E.2d at 811. When an employee is engaged in the furtherance the employer's business, it is immaterial that he join in some private purpose of his own. Id. The joining of some personal motive with the business of the employer is not alone sufficient to make that action "purely personal" such that the employee is acting outside the scope of his employment. Miller, 294 S.E.2d at 630; see Reynolds v. L & L Mgmt., Inc., 492 S.E.2d 347 (Ga. Ct. App. 1997) (not purely personal

19 In the usual case examining scope of employment, a plaintiff is attempting to establish respondeat superior liability for the employer and is therefore attempting to demonstrate that an employee was acting within the scope of their employment. Here, Plaintiff finds herself in the position of contending that the Individual Defendants are acting outside the scope of their employment. While the cases cited refer to fact questions, in this inquiry the Court is the fact finder. See Borneman v. United States, 213 F.3d 819, 827 (4th Cir. 2000) ("[I]t is for the district court to weigh the sufficiency of the evidence, to determine whether genuine issues of fact exist and ultimately to resolve these factual issues.").

when fast food restaurant manager slammed his fist down on a stack of trays which hit plaintiff customer in the face during argument involving personal comments). By contrast, Georgia Courts have generally held that an individual acts for a purely personal motive when he engages in sexual misconduct and that such actions are not not in furtherance of the employer's business. See Palladino, 580 S.E.2d at 217 (collecting cases).

Based on the Court's review of Plaintiff's evidence, including Plaintiff's affidavit and supporting exhibits, Plaintiff's live testimony presented at the hearing, and Plaintiff's supplemental affidavit, the Court finds that Plaintiff has not demonstrated that Defendants were acting outside the scope of their employment at the time of the alleged tortious conduct. In fact, Plaintiff's complaints revolve entirely around actions taken by Defendants and decisions made by them which specifically involved Plaintiff's performance as an employee of the IRS. Defendants' actions in making personnel decisions including employee discipline, participating in investigations of employee wrongdoing and decisions regarding employee training and promotions are within the furtherance of the employer's business.[20] By under taking these actions, Defendants are engaged in nothing more than the performance of their duties as supervisors within the IRS. (See Defs.' Resp. in Opp'n to Mot. [249] and Exhibits thereto.)

Primarily, Plaintiff contends that the intentional nature of Defendants' actions take them outside the scope of their employment. She also maintains that they were outside

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20 Defendants also filed supplemental declarations after the hearing [249]. The filings include declarations by the Individuals Defendants including attachments stating job descriptions.

the scope of employment because Defendants' actions were contrary to IRS policy, and they could have been disciplined or terminated for their actions. As to Plaintiff's contention regarding the intentional nature of the actions she contends were taken against her, the proper inquiry is not directed to the authority to commit the tort, but rather the authority to accomplish a purpose in pursuance of which a wilful tort is committed. Reynolds, 492 S.E.2d at 349. Therefore, even accepting as true that the actions taken against her were intentional, or even malicious, this alone does not take Defendants' actions outside the scope of their employment. Id. at 350 (the fact that a defendant's actions may have been mingled with personal motives or purposes does not automatically take their actions outside the scope of their employment when the employee's actions are done in the line of his duty and in the prosecution of the employer's work); see Gaylor v. Jay & Gene's Chrysler-Plymouth-Dodge, Inc., 358 S.E.2d 655, 656 (Ga. Ct. App. 1987) ("the fact that the alleged tort was intentional rather than negligent does not, in and of itself, preclude the doctrine of respondeat superior").

Additionally, Plaintiff asserts that Defendants' actions could subject them to discipline or termination by the IRS and consequently they were outside the scope of employment. In essence, Plaintiff's arguments do not suggest that the Individual Defendants' actions were not part of their duties as IRS employees and supervisors, but rather that Plaintiff disagreed with the decisions that were made. For instance, Plaintiff contends that a black candidate was preselected for an International Examiner position for which she wished to apply. Plaintiff argues that she was more qualified for the position and then refers to regulations to suggest that employees may be terminated for

misconduct. (See Pl.'s Suppl. Aff. [250] at 17-19.) Plaintiff does not even contend that any of the named individuals was actually the person responsible for selecting the person for the International Examiner position. Nor has she alleged any personal motive or shown how the decision of which employee to select for an opening is outside the scope of employment of an IRS supervisor. In another complaint, Plaintiff contends that Defendants retaliated against her when she reported illegal and unethical conduct within the IRS to the news media and to members of Congress. There, Plaintiff complains that her immediate supervisor conducted frequent workload reviews of her work and instructed her to leave files at the office. Again, even though Plaintiff contends that these actions were taken for the purpose of inducing Plaintiff to quit her job, she has not identified any basis for these obviously job-related decisions to fall outside the scope of Ms. Edmundson's job as Plaintiff's direct supervisor.[21]

Though the Court does not find it necessary to identify and discuss each of Plaintiff's assertions, the Court has carefully reviewed each of the "specific acts" Plaintiff has identified in her submissions to the Court. The Court finds that Plaintiff has not demonstrated that the Individual Defendants were acting outside the scope of their federal employment. Moreover, Plaintiff's factual allegations completely fail to identify any allegedly tortious actions taken at all by some of the individual defendants. Since Plaintiff has not shown that the individuals were acting

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21 The job description attached to Ms. Edmundson's declaration states that "The incumbent of this position exercises the following supervisory and managerial authorities: . . . 7. Develops performance standards and evaluates work performance of subordinates. . .9. Interviews candidates for positions in the unit; recommends appointment, promotion or reassignment to such positions. . ." (See Wanda Edmundson Decl. [249].)

outside the scope of their employment, the United States Attorney's certification is proper. Defendant United States is substituted for the Individual Defendants as to Plaintiff's claims for intentional infliction of emotional distress.

## B. Claims against the United States

Having determined that the Individual Defendants were acting in the scope of their employment at the time of the alleged tortious conduct, Plaintiff may not maintain her claim for Intentional Infliction of Emotional Distress. In Broughton v. Courtney, 861 F.2d 639 (11th Cir. 1988), the Eleventh Circuit examined the CSRA and concluded that where a Plaintiff's state law claims are within the scope of coverage of the CSRA then those claims are preempted by the CSRA. Id. at 643. In Broughton, a federal employee sued two former supervisors for state law torts alleging malicious interference with employment and conspiracy to interfere with employment. Id. at 640. The Broughton court noted that the CSRA preempts challenges to personnel actions brought under federal law. Furthermore, the court stated that where state law creates an obstacle to the attainment of federal policy goals, the law is preempted. Id. at 642. The court examined the alleged tortious conduct, concluded that it fell within the scope of prohibited personnel practices as outlined in 5 U.S.C. § 2302(b), and held that it was therefore preempted by the CSRA. Id. at 644.

Plaintiff contends that Defendants resolved taxpayer disputes in favor of taxpayers who would write negative letters against her; that they destroyed official documents to cover up such activity; that they discriminated against Plaintiff in violation of Title VII; that they retaliated against Plaintiff for reporting violations to Congress and the media;

and that they deliberately inflicted emotional damage that affected her emotional and physical health. (See Pl.'s Resp. to Def. United States Mot. to Dismiss or Mot. for Summ. J. [238] at 15-16; Pl.'s Supp. Aff. [250].)

Section 2303(b) specifically identifies as a prohibited personnel practice discrimination in violation of Title VII. 5 U.S.C. § 2302(b)(1)(A). It also prohibits retaliation for disclosures of information that an employee reasonably believes constitutes a violation of the law, rule or regulation or gross mismanagement, gross waste of funds, abuse of authority, or a substantial danger to public health or safety. 5 U.S.C. § 2302(8). Moreover, § 2302(b) prohibits the solicitation of any recommendation or statement with respect to an individual who is under consideration for a personnel action except as specifically provided. 5 U.S.C. § 2302(2). Finally, § 2302(b)(4) prohibits the willful obstruction of any person with respect to that person's right to compete for employment. Id. at 643. Because Plaintiff's allegations supporting her state law tort claim constitute prohibited personnel actions as contemplated by § 2302(b), they are preempted by the CSRA. See McDowell v. Cheney, 718 F. Supp. 1531, 1546 (M.D. Ga. 1989) (dismissing plaintiff's claim for intentional infliction of emotional distress because her emotional distress was merely a result of other actions she complained about which were preempted by the CSRA). The fact that Plaintiff has asserted claims for intentional torts does not alter the Court's analysis. Broughton, 861 F.3d at 643-44 (noting that § 2302 includes a variety of actions otherwise characterized as torts under state law and stating that "[t]he fact that these are intentional torts does not mean that they are not included in 5 U.S.C. § 2302(b)." ). Plaintiff's Count V is due to be **DISMISSED.**

## VI. Attorneys Fees and Costs

Having determined that dismissal or summary judgment is proper as to Plaintiff's claims, Plaintiff is not entitled to recover attorneys' fees or costs.[22]

22 The Court notes that even though Plaintiff is represented by able counsel she has filed the supplemental affidavit herself. Moreover, it has come to the Court's attention, that on February 9, 2005 Plaintiff filed a Response to Defendant's Motion to Strike at docket number [248] where she signed the name of counsel without her attorney's express permission to do so. This kind of behavior is entirely unacceptable behavior before the Court. During these proceedings, Plaintiff has been repeatedly cautioned to comply with the proper procedure to communicate with the Court and to avoid improper ex parte communications.

This case has a long and winding procedural history, and the Court has chosen to take the considerable time to address this case on its legal merits, rather than dispose of it based on procedural missteps. The Court's desire to address the merits, however, is not meant to overlook this Court's disdain for misrepresentations made to it. Since this case is due to be closed, the Court declines to sanction Plaintiff at this time. Plaintiff is admonished to proceed in compliance with the Local Rules in any future communications and filings with this Court.

## Conclusion

Defendant United States Motion to Dismiss or for Summary Judgment [207-1] is hereby **GRANTED**, Defendant John W. Snow's Motion for Summary Judgment [209-1] is hereby **GRANTED**, Defendants' Ty Ayers, Wanda Edmundson, Michael McBride, John Butkovich, William Zachery, and Richard Byrd Motion for Summary Judgment [211-1] is hereby **GRANTED** and Defendants' Motion to Strike Plaintiff's Documents filed January 7, 2005 [246-1] is hereby **DENIED**. This case is hereby **DISMISSED**.

**SO ORDERED** this 22nd day of February, 2005.

/s/ Richard W. Story
RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

# C

C-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVEN... CIRCUIT
APR 14 2005
THOMAS K. KAHN
CLERK

No. 05-11583

SARAH E. HENDRIX,

Plaintiff-Appellant,

versus

JOHN SNOW, Secretary of the
Department of the Treasury of
the United States of America,
UNITED STATES OF AMERICA,
WANDA EDMUNDSON,
MICHAEL MCBRIDE,
JOHN BUTKOVICH, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, WILSON and FAY, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Sarah E. Hendrix is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

CRD-41

# D

D-1

**Docket No. 97-03579-CV-RWS-1**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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SARAH E. HENDRIX,
Plaintiff-Appellant,

vs.

JOHN SNOW, Secretary of the
Department of the Treasury of
the United States of America,
UNITED STATES OF AMERICA,
RICHARD BYRD, MICHAEL MCBRIDE,
JOHN BUTKOVICH, WANDA EDMUNDSON,
TY AYRES, and WILLIAM ZACHERY

USDC Civil Action No.:
1:97-CV-3579-RWS

Defendants-Appellees.

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**PETITION FOR REHEARING EN BANC OF PANEL'S FEBRUARY 8, 2006 ORDER**

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Sarah Hendrix
Pro Se Appellant/Plaintiff
134 Somerset Lane
Atlanta, GA 30328

# E

E-1

# United States Court of Appeals

Eleventh Circuit

56 Forsyth Street, N.W.
Atlanta, Georgia 30303

**Thomas K. Kahn**
Clerk

For rules and forms visit
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June 01, 2006

Sarah E. Hendrix
134 SUMMERSET LANE
ATLANTA GA 30328-1663

**Appeal Number: 05-11583-DD**
Case Style: Sarah E. Hendrix v. John W. Snow
District Court Number: 97-3579 CV-RWS-1

The following action has been taken in the referenced case:

We have received your Petition for Rehearing, however the time for filing has expired. You will need to file a Motion for leave to file the Rehearing Out of Time.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Elora Jackson (404) 335-6173

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**Docket No. 05-11583-DD**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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SARAH E. HENDRIX,
Plaintiff-Appellant,

vs.

JOHN SNOW, SECRETARY
OF THE DEPARTMENT OF
TREASURY OF THE UNITED
STATES OF AMERICA,
RICHARD BYRD, MICHAEL MCBRIDE,
JOHN BUTKOVICH, WANDA EDMUNDSON,
TY AYRES, and WILLIAM ZACHERY

USDC Civil Action No.:
1:97-CV-3579-RWS

Defendants-Appellees.

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**APPELLANT'S MOTION FOR LEAVE TO FILE FOR REHEARING EN BANC OUT OF TIME**

COMES NOW Appellant Sarah E. Hendrix (Appellant"), and files this Appellant's Motion for Leave to File for Rehearing En Banc Out of Time in response to the Court's request even though according to Appellant's understanding of the 11th Cir Rule 35, she had filed the Petition for Rehearing En Banc in a timely manner.

The *pro se* Appellant filed a Petition for Rehearing of the February 8, 2006 11th Circuit Court Order based on the numerous factual mistakes.

# F

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# United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

**Thomas K. Kahn**
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June 15, 2006

Sarah E. Hendrix
134 SUMMERSET LANE
ATLANTA GA 30328-1663

**Appeal Number: 05-11583-DD**
Case Style: Sarah E. Hendrix v. John W. Snow
District Court Number: 97-3579 CV-RWS-1

The papers you recently submitted to this office are being returned for the reason stated.

Please disregard letter dated 6/1/06. Your petition for rehearing was denied 4/14/06. You may petition for certiorari to the United States Supreme Court.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Regina Veals-Gillis (404) 335-6163

Encl.